TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 772

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1941.

CERTIORARI GRANTED JANUARY 5, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2223

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, Appellant,

vs.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, Appellees

STATEMENT OF POINTS—Filed October 25, 1940

The plaintiff-appellant intends to appeal from the decision of the United States District Court for the District of Kansas, entered in the above case on July 1, 1940, wherein the court ordered the dismissal of plaintiff-appellant's complaint for a declaratory judgment and has designated as the basis for its appeal the complete record and all the proceedings and evidence had therein.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri. Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri, Attorneys for Plaintiff-Appellant.

Service of a copy of the within statement of points is hereby acknowledged this 24 day of October, 1940.

Clarence C. Chilcott, 918 Scarritt Building, Kansas City, Missouri. Ratner, McAllister & Mattox, Parsons, Kansas. Attorneys for Defendants-Appellees.

[File endorsement omitted.]

[fol. 2] DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL—Filed October 25, 1940

To the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit:

Pursuant to the provisions of Rule 13 (1) of the United States Circuit Court of Appeals for the Tenth Circuit, and

Rule 75 of the Federal Rules of Civil Procedure, appellant, the Excess Insurance Company of America, designates the following portions of the record, proceedings and evidence in the above-entitled cause to be contained in the record on review:

The complete record and all the proceedings and evidence in the above cause, to wit:

1. Docket entries of all proceedings before the United States District Court for the District of Kansas.

2. Plaintiff's complaint.

3. The marshal's return, showing service on defendant Brillhart.

4. Defendants' motion to dismiss.

5. Transcript of all proceedings at hearing of July 1, 1940.

6. District Court's judgment and order of dismissal entered July 1, 1940.

7. Notice of appeal, together with date of filing.

8. The appeal bond.

9. This designation of the contents of the record.

10. Statement of points.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri. Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri. Attorneys for Plaintiff-Appellant.

[fol. 3] Service of a copy of the foregoing designation of contents of record on appeal is hereby acknowledged this 24 day of October, 1940.

Clarence C. Chilcott, 918 Scarritt Building, Kansas City, Missouri. Ratner, McAllister & Mattox, Parsons, Kansas. Attorneys for Defendants-Appellees.

[File endorsement omitted.]

[Caption omitted.]

[fol. 4] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

Civil

No. 1185

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, Plaintiff,

vs.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, and Walter C. Young, Defendants

DOCKET ENTRIES

Apr. 10, 1940—Complaint filed.
Apr. 10, 1940—Summons issued and furnished Marshal together with copies of the Complaint to be served upon Defendants.
Apr. 25, 1940—Application to Show Cause why Temporary Injunction should not issue against Deft.
Apr. 25, 1940—Order to Show Cause why Temporary Injunction should not issue against defts. filed and ent. J. H. 60 (Hopkins).
Apr. 26, 1940—Summons returned, Executed by service on Dewey Brillhart by leaving a copy of Complaint and Summons with Mrs. Minnie. Brillhart, wife. Walter C. Young deft. died Aug. 2, 1939. (Marshal's costs 7.95.)
Apr. 29, 1940—Copy of Order to Show Cause Returned by Marshal Executed by Service on Dewey Brillhart (Marshal costs 4.50).
[fol. 5] May 2, 1940—Stipulation to transfer case for trial at Kansas City, Kansas filed.
May 22, 1940—Case set for trial Kansas City, Kans. 11:00 A. M. June 5, 1940.
May 23, 1940—Affidavits on behalf of Dick Woods and W. B. Wise filed.
June 6, 1940—Motion to Dismiss filed by Deft. Brillhart.
June 7, 1940—Notice of Hearing to be held in Kansas City together with Application for Default Judgment against Dewey Brillhart.
June 27, 1940—Motion to Dismiss and Answer filed (Letter 6-27-40).

June 27, 1940—Suggestions Supporting Motion to Dismiss filed.
July 10, 1940—Reply Brief of Defendants filed.
July 29, 1940—Brief for Plaintiff filed.
July 29, 1940—Order of Dismissal assessing costs against plaintiff filed and entered J. H. 96 (Hopkins).
July 29, 1940—Certified copy Order of Dismissal to Judge Louis R. Gates.
July 29, 1940—Certified copy Order of Dismissal to Ratner & McAllister.
Aug. 1, 1940—J. S. 9 to Topeka.
Aug. 28, 1940—Notice of Appeal filed and copy mailed to attys (Ratner & McAllister and Clarence Chilcott) for deft.
Aug. 28, 1940—Appeal Bond in am't of $250.00 filed.
Sept. 7, 1940—Statement of Points filed.
Sept. 7, 1940—Designation of Contents of the Record on Review filed.
Sept. 7, 1940—Transcript of Proceeding of July 1, 1940 filed.
Oct. 1940—Transcript of Record on Appeal mailed to Hon. Howard F. McCue, Clerk at Topeka, Kansas.

[fol. 6] Bill of Complaint for Declaratory Judgment and Other Relief—Filed April 10, 1940

Comes now the plaintiff and alleges and shows:

1. Plaintiff is an insurance corporation, formerly organized and existing under the laws of the State of New Jersey, now organized and existing under the laws of the State of New York, with its principal office and place of business in the City, County and State of New York, and is a citizen and resident of the State of New York. Defendants Dewey Brillhart and Walter C. Young are citizens and residents of the State of Kansas, and of the District of Kansas.

This is a suit of a civil nature between the plaintiff on the one side and the defendants on the other, both of the defendants being citizens and residents of states other than that of plaintiff; and the amount in controversy (as

hereinafter more fully shown) exceeds the sum and value of $3,000, exclusive of interest and costs.

2. Henry G. Miller, receiver, is the duly appointed, qualified and acting receiver of Central Mutual Insurance Company of Chicago, Illinois, and of all of its properties and assets, said company having been organized and having existed as an insurance corporation under the laws of the State of Illinois.

3. In the year 1932, plaintiff and said Central Mutual Insurance Company of Chicago, Illinois entered into a written contract whereby, in consideration of certain premiums to be paid by Central to plaintiff and of other covenants of Central to plaintiff in said contract provided, plaintiff, subject to the terms and conditions of the contract, agreed to re-insure Central as respects certain third party automobile public liability policies thereafter to be issued by Central and becoming effective while said contract was in force. By the terms of said contract, plaintiff agreed to repay to Central any amounts of ultimate net loss which Central should pay in cash in excess of the first $5,000 on account of any one person injured or killed and in excess of the first $10,000 on account of more than one person injured or killed in any one accident, provided, however, that the obligation of plaintiff should not exceed $145,000 on account of one person injured or killed, or $240,000 for two or more persons killed or injured in any one accident.

[fol. 7] That said excess reinsurance contract contained, among others, the following provisions ("Central" being referred to in said contract as "the Company"):

"Section II. The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable, after making proper deductions for all recoveries, salvages and other reinsurances or insurances, and shall exclude all expenses for salaried employees incurred in investigation, adjustment and litigation. Other loss and legal expenses, including court costs, incurred with the consent of the Reinsurer shall be apportioned in proportion to the respective interests as finally determined.

"Section III. The liability of the Reinsurer shall commence simultaneously with that of the Company and shall be subject in all respects to all the general and special

stipulations, clauses, waivers and modifications of the original policy or other undertaking and any endorsements or riders thereon.

* * * * * * *

"Section V. The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made.

* * * * * * *

"Section IX. The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. Such notice shall be given to the Reinsurer on Preliminary Loss Advice on forms as per copy attached, and when final settlement is made the Reinsurer shall advise on Final Loss Advice on forms as per copy attached.

"The Reinsurer shall have the right and opportunity to associate with the Company in the defense and control of any claim or suit or proceeding relative to an accident where the claim or suit involves this reinsurance."

[fol. 8] Said contract was signed by plaintiff in the City, County and State of New York and by Central in the City of Chicago, in the State of Illinois, was delivered to Central and became effective either in the State of Illinois or State of New York and the premiums thereon were paid by Central to plaintiff either in the State of Illinois or the State of New York, and the agreement is either an Illinois or a New York contract, is not a Missouri or Kansas contract, and is not governed or to be interpreted by the laws of the State of Missouri or the State of Kansas.

4. Cooper-Jarrett, Inc., is and was at all times mentioned herein a motor freight carrier engaged for hire in the transportation of freight by motor vehicles in the various states of the Union, carrying its freight, among other places, from Kansas City, Missouri to the State of New York, and operating either its own motor vehicles or leasing or hiring the motor vehicles of others.

5. While the said contract or agreement of reinsurance was in force, and in January, 1934, said Central Mutual Insurance Company of Chicago, Illinois, issued its public

liability policy to Cooper-Jarrett, Inc., whereby in consideration of certain premiums therein agreed to be paid by Cooper-Jarrett, Inc. to Central, the latter, for the period from January 30, 1934 to January 30, 1935, and subject to the terms and conditions of said policy, agreed to insure Cooper-Jarrett, Inc. against loss from liability imposed by law upon Cooper-Jarrett, Inc. for damages on account of bodily injuries, including death resulting therefrom accidentally suffered or alleged to have been suffered by any person or persons through the ownership, maintenance or operation of any automobile described in the schedule in said policies, provided said injuries or death occurred within the period of said policy. The policy further provided that Central's limit of liability on account of one person so injured or killed should be $5,000.00 and, subject to the same limit for each person, its total liability on account of any one accident was $35,000.

Subsequent to the execution of said policy and by riders thereto attached in February, 1934, Central by "Hired Car Endorsements" agreed that said policies should cover the operation of automobiles and trailers of the type stated in the policies which were or should be hired by Cooper-[fol. 9] Jarrett, Inc. during the terms thereof and used for the purposes stated in the declarations of said policies.

Another rider attached in March, 1934, provided:

"In consideration of an additional premium of $13.13, it is understood and agreed that the limit of Liability for Personal Injury for One Person is increased to $10,000.00 instead of as originally written."

6. In October, 1934, an accident occurred in the State of Ohio in which a truck owned or leased by Cooper-Jarrett, Inc. was involved, and in which the defendant Brillhart's decedent was killed and the defendant Young was or claims to have been injured. Following these accidents two suits were filed in the Circuit Court of Jackson County, Missouri, at Independence, against Cooper-Jarrett, Inc., by the two individual defendants herein, charging that the injuries and death above described were the result of negligence on the part of Cooper-Jarrett, Inc., the death case being brought under the wrongful death statutes of Ohio. In both of these suits default judgments have been obtained against Cooper-

Jarrett, Inc., under circumstances hereinafter to be shown, the dates of filing, the amounts sought and the amount of recoveries in the two cases being as follows:

Style of Case	Amount of Recovery Sought	Date of Filing	Date and Amount of Judgment
Dewey Brillhart, administrator of the Estate of James Dwight Brillhart, deceased, vs. Cooper-Jarrett, Inc.	$25,000	12-4-35	April 22, 1939 $20,000
Walter C. Young, vs. Cooper-Jarrett, Inc.	10,000	4-23-36	April 22, 1939 $10,000

7. When these suits were filed Central refused to take over their defense upon the ground that the death and injuries alleged to have been sustained were not covered by the terms of the policy, whereupon Cooper-Jarrett, Inc. took over their defense, employed counsel, and filed answers in each case traversing the allegations of the respective [fol. 10] petitions. On January 11, 1937, Central being hopelessly insolvent, the Circuit Court of Cook County, Illinois, having jurisdiction in the premises, entered an order providing for the liquidation of said company and appointing a receiver of all of its properties. On January 21, 1937, said court, by order, restrained and enjoined all parties from bringing, prosecuting or maintaining any action against Central. On February 1, 1937, said court, by order, instructed the receiver not to continue or assume the defense of any suits upon which Central had previously had outstanding liability policies, and ordered all parties having claims or demands against the estate of Central to present their claims in said court. Cooper-Jarrett, Inc. and the two individual defendants herein were, as plaintiff is informed and believes, duly advised of said orders and proceedings. Thereafter, the Illinois court, by order and on due notice, fixed a time limit within which claims could be filed against the estate of Central and provided that all claims not filed within that time should be forever barred. Neither the individual defendants herein nor

Cooper-Jarrett, Inc. have ever filed any claims in the receivership in Chicago, and there is no longer any liability on Central or its receiver under Central's primary policy.

On May 14, 1937, Cooper-Jarrett, Inc. filed its petition in the District Court of the United States for the Western Division of the Western District of Missouri for reorganization under the provisions of Section 77B of the Federal Bankruptcy Act. That court, approving said petition, entered a general order providing for the filing of claims against the debtor in that court, pursuant to which both of the individual defendants herein filed their claims for the same amounts, respectively, sought in the two suits in the Circuit Court of Jackson County, Missouri. On September 30, 1937, the attorneys employed by Cooper-Jarrett, Inc. to defend the two state court suits against said Cooper-Jarrett withdrew, no counsel were substituted in their place, and from and after that time Cooper-Jarrett, Inc. was wholly without legal representation, and neither of said suits was longer defended. On April 1, 1939, in the 77B reorganization proceeding, the District Court of the United States for the Western Division of the Western District of Missouri, on ex parte application therefor reciting that Cooper-Jarrett, Inc. had "insurance," made an order permitting Brillhart, administrator, and Young to prosecute their actions in the state court. Sometime after the entry [fol. 11] of the aforesaid orders, Brillhart, administrator, and Young withdrew their claims in the 77B proceedings, and on April 1, 1939, in the final decree of the 77B court in said proceeding the debtor, Cooper-Jarrett, Inc. was fully and finally discharged from any claim or judgment that had been obtained or might be obtained by the defendant Brillhart, administrator, and the defendant Young.

8. Following the default judgments against Cooper-Jarrett, Inc. and on June 20, 1939, the defendants Brillhart and Young attempted to serve, notwithstanding the existing orders of the Circuit Court of Cook County, Illinois, summonses in garnishment on execution upon Central, by delivering copies thereof to the Chief Clerk of the Superintendent of Insurance of the State of Missouri. Following said attempted service and on September 15, 1939, interrogatories to Central, as garnishee, were filed in the Jackson County Circuit Court at Independence, and on January 26, 1940, no answers to the interrogatories in the Young

case having been filed, the Circuit Court of Jackson County at Independence entered its interlocutory judgment in favor of Young and against Central, as garnishee, in the amount of $10,450, and ordered said sum to be paid into court within ten days. On February 9, 1940, the said sum of $10,450 not having been paid into court pursuant to the order of the interlocutory judgment, the Circuit Court of Jackson County at Independence entered its final judgment in favor of Young and against Central in the amount of $10,450. No interlocutory judgment or final judgment has been entered in the Brillhart case.

10. Notwithstanding the existing orders of the Circuit Court of Cook County, Illinois, on January 18, 1940, the defendants Young and Brillhart attempted to serve additional summonses in garnishment upon Central as the garnishee of Cooper-Jarrett, Inc., through the Sheriff of Cole County, Missouri, by delivering copies thereof to F. P. Sizer, Deputy Superintendent of Insurance of the State of Missouri. Said summonses were returnable to the March, 1940, Term of the Circuit Court of Jackson County, Missouri, and on March 11, 1940, interrogatories were filed in the defendant Brillhart's case. No interrogatories under the second summons in garnishment have been filed in the defendant Young's case.

[fol. 12] 11. Neither Cooper-Jarrett, Inc., nor Central, nor its receiver, have ever paid out anything to the individual defendants herein, either on their claims or their purported judgments.

12. An actual bona fide, justiciable controversy has arisen and exists between the plaintiff on the one side and the defendants on the other in that—

(a) Plaintiff contends that the reinsuring agreement between it and Central is a pure contract of excess reinsurance, in which plaintiff's only obligation is to indemnify Central, as in the contract provided, against loss for sums actually paid in cash in settlement of losses for which Central was liable; and that therefore plaintiff never became and is not obligated to either of the defendants, in any sum whatever.

(b) The judgment creditor defendants herein contend that the contract between plaintiff and Central is one of

insurance against liability rather than of indemnity against loss; and that both under the contract and also by virtue of the provisions of Sections 5898 and 5899, R. S. Mo. 1929, plaintiff is obligated to Central or its receiver, to Cooper-Jarrett, Inc., and to each of the defendant judgment creditors herein, for all sums in each of the default judgments against Cooper-Jarrett, Inc., within the limits of the primary policy, and beyond the first $5,000 of each judgment, notwithstanding no payments on said judgments have been made either by Cooper-Jarrett, Inc. or Central or by its receiver, and notwithstanding both Cooper-Jarrett, Inc. and Central and its receiver have been fully discharged from all liability to these judgment creditors.

(c) Plaintiff contends that Sections 5898 and 5899, R. S. Mo. 1929, do not apply to reinsuring agreements, that even if they did that they do not apply to its agreement with Central, the contract being an Illinois or New York agreement and not governed by Missouri law; and that in no event is it liable either under its contract with Central or under the law, to the judgment creditor defendants herein or to Cooper-Jarrett, Inc., there being no privity between them. Plaintiff also contends that even if its agreement with Central was one of insurance against liability, that it is not indebted to either of the defendants, since Central, its receiver, and Cooper-Jarrett, Inc. have themselves been [fol. 13] fully discharged from all liability on the claims and judgments of Young and Brillhart.

13. Plaintiff is informed and believes and therefore alleges, that under the facts there was no liability on the part of Cooper-Jarrett, Inc., to either the defendant Brillhart or Young; that even if any liability existed, that the amounts of the recoveries in each of the default judgments were far in excess of the actual loss or damage sustained by the respective plaintiffs in the State court action, or the amounts which they would have recovered had the causes been defended; that each of the persons injured or killed in the accident was at the time an employee of Cooper-Jarrett, Inc. within the meaning of the Ohio Workmen's Compensation Law, where the accident occurred, and the Missouri Workmen's Compensation Law, where they were employed, and their claims were covered by and limited to those arising under Workmen's Compensation Law, and were not within the coverage of Central's primary policy,

which did not include Workmen's Compensation claims; and that if these facts had been developed in the garnishment proceedings against Central there would have been no judgment against the garnishee, in the Young case.

Plaintiff was never advised by Central either of the accident or of the filing of the suits, and it was not aware of the pendency of the suits against Cooper-Jarrett or Central until it received a letter from Mr. Frank P. Barker, attorney for Cooper-Jarrett, Inc., in the reorganization proceedings in February of 1939. Plaintiff further states that in the reinsuring agreement Central was at least impliedly obligated in good faith to provide adequate defense against all claims and suits in which the recoveries sought against Central's assureds were in amounts which might involve plaintiff in obligation under the reinsuring agreement, and that by reason of Central's failure to defend those suits, as well as its failure to notify plaintiff of the accidents and of the pendency of these suits, as required by Section IX of the reinsuring agreement, plaintiff was relieved and released of any and all obligation, as to these claims and suits, even if such obligation otherwise existed. Plaintiff further states that on abandonment of the defense of the suits by Central and notice thereof to Cooper-Jarrett, Inc., it became the duty of Cooper-Jarrett, Inc., itself to pro-
[fol. 14] vide and maintain in good faith an adequate defense against said claims and not to permit the entry of default judgments against it, by reason of which Central was released from any obligation under its primary policy, and plaintiff was released of all obligation, if any otherwise existed, under its agreement.

Moreover, plaintiff was not and is not bound as against any of the defendants herein by any of the default judgments hereinbefore mentioned, for the reason that it was neither a party to any of the proceedings leading up to them nor notified of their pendency, and that for plaintiff to be so bound, in such circumstances, would deprive it of its property without the due process of law guaranteed to it by Article XIV, Section 1, of the Amendments to the Constitution of the United States.

14. The judgment against Central as garnishee in the Young case was coram non judice and void and its entry was in effect a denial by the Missouri State Court of the full faith and credit accorded by Article IV, Section 1, of

the Constitution of the United States to the existing judgments, orders and proceedings in the Circuit Court of Cook County, Illinois, in this: That the Illinois receivership proceeding was a statutory receivership for the winding up and dissolution of Central in the state of its being, in which the Illinois court lawfully took unto itself exclusive jurisdiction of Central's property and of all claims and demands against it, and in which proceeding the Illinois court had enjoined and forbidden the further prosecution of any claim against Central; and in which proceeding, under Illinois law, the receiver succeeded to the title of Central's assets, and which proceeding effected the dissolution of Central as a corporation long prior to the time of the attempted service of summonses in garnishment against Central in the Missouri cases.

15. The defendants and each of them have been and are threatening to attempt enforcement of their asserted claims against this plaintiff by proceedings to be instituted against plaintiff upon the basis of pretended judgments against Cooper-Jarrett, Inc. and Central. And all of the steps already taken by them in procuring the pretended default judgments against Cooper-Jarrett, Inc. and in attempting to procure default judgments against Central have been for that sole purpose, both Cooper-Jarrett, Inc. and Central [fol. 15] and its receiver having long since been discharged from all obligations upon the claims of these defendants.

And while defendants have not as yet actually demanded of plaintiff the payment of any part of these judgments, nevertheless a present justiciable controversy exists between plaintiff and these defendants as to whether plaintiff is so obligated and defendants are, by the acts heretofore asserted, committed and threatened, proceeding to lay the foundation for asserting their claims against the plaintiff, and plaintiff's rights in the premises are in present and immediate jeopardy.

16. Both the individual defendants herein, as judgment creditors of Cooper-Jarrett, Inc., are asserting and claiming the right to recover from plaintiff the amount of each of their judgments in excess of $5,000, through the process of the Missouri state court in which they were entered, all as heretofore shown, notwithstanding neither Cooper-Jarrett, Inc. nor Central nor its receiver has paid anything on them and notwithstanding they have been relieved and

released from all liability. Plaintiff's only contractual relationship was with and its only contractual obligation was to Central. If it is liable at all to anyone, plaintiff does not know and needs the protection of the single decree of this court, to which all of the claimants and interested parties are parties, adjudging whether that obligation, if any, is due to the receiver of Central, to Cooper-Jarrett, Inc., or to the individual judgment creditor defendants herein, without which plaintiff stands exposed to the hazard of and threatened with the continuation and the institution of a multiplicity of suits, which will not only subject plaintiff to great and unnecessary expense but also to the hazard of being compelled again to pay to the defendants herein the same amounts previously paid to Cooper-Jarrett, Inc. and/or others.

17. The default judgments against Cooper-Jarrett, Inc. and Central were obtained under circumstances amounting to legal fraud upon the courts which entered them. While plaintiff disclaims any intentional wrong on the part of anyone, nevertheless, in none of the proceedings resulting in these judgments, were the courts entering them advised in the evidence submitted, of the reinsuring agreement, of the fact that plaintiff had not been notified of the pendency of these cases, or that plaintiff, under its contract with Central had the right to appear and defend them. Moreover, after [fol. 16] the withdrawal of counsel for Cooper-Jarrett, Inc. in the two suits, no efforts whatever were made by counsel for Cooper-Jarrett, Inc. further to defend said suits, and said default judgments were suffered to be entered without Cooper-Jarrett, Inc. being represented by counsel at all. Nor in the garnishment proceedings against Central was or is Central represented by counsel, nor was the court entering said judgment advised in the evidence before it of the fact that orders of the Illinois court were in effect enjoining the prosecution of such proceedings or that Central had previously been dissolved as a corporation. And for the judgment creditor defendants herein to recover from plaintiff upon the basis of the default judgments against Cooper-Jarrett, Inc. and Central would not only be unconscionable, inequitable and unjust, but would also be tantamount to an abuse of the process of the courts, and would in effect actually deprive plaintiff of the due process of law guaranteed to it by the XIVth Amendment, Section 1 thereof, to the Constitution of the United States.

18. The defendants, Brillhart and Young, are pressing and prosecuting their claims against plaintiff through the processes of legal and equitable garnishments on their default judgments, on the claim and premise that the judgments are valid and conclusive as against plaintiff and that plaintiff is indebted both to Central and Cooper-Jarrett under the reinsuring agreement, and also to them, under said agreement and under the law.

Save and except the actual merits of the claim of each of the respective judgment creditor defendants herein, all of the questions, legal and equitable, presented by this complaint, are common to both of the defendants, which questions can be settled with more facility and ease in one equitable proceeding and with advantage not only to plaintiff but to the defendants, as well. Moreover in the respective garnishment proceedings, threatened and now being pressed, the returns of the Sheriff on the garnishment summonses directed to Central and to the plaintiff cannot in those proceedings, be inquired into as to the facts recited in said returns, as fully as may be in this equitable proceeding; and in these respects also, plaintiff is without adequate remedy except in this cause.

[fol. 17] 19. Plaintiff further states that if the respective judgment creditor defendants herein are allowed to proceed in the threatened or pending garnishment proceedings, or in other proceedings, in the state court, and unless their attorneys and agents are restrained and enjoined from such action by a temporary injunction issued by this court, that plaintiff, will or likely will, suffer irreparable loss and damage to its property and to its rights, and the full efficacy of any judgment and decree entered in this court, in this cause will be threatened and impaired.

Wherefore, plaintiff prays that this court take and assume jurisdiction of this suit, of the subject-matter hereof, and of the controversies herein presented; that it will, by its orders, judgments and decrees, fully and finally determine and settle all of said controversies, all of the rights and legal relations of the parties hereto with, for and/or against each other and among themselves concerning said controversies; enjoin and forever restrain the defendants, and each of them, from further maintaining or prosecuting all or any of the Missouri state court proceedings mentioned herein, and from instituting any other actions or proceed-

ings of like character in any other court, or from questioning or challenging the proceedings and/or any decree entered herein; and that in the meantime this court make an order upon each of the defendants herein, their attorneys and agents, requiring them to appear before this court on a date in said order named and show cause, if any they have, why a temporary injunction should not issue; and for such other and further relief as the court may deem equitable and just.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Bldg., Kansas City, Missouri. Dick H. Woods, 201 First National Bank Bldg., Kansas City, Missouri.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

SUMMONS—Filed April 26, 1940

To the above named Defendants:

You are hereby summoned and required to file in the Clerk's office at Fort Scott, Kansas, and serve upon Ryland, Stinson, Mag & Thompson, plaintiff's attorney, whose address is Kansas City, Missouri, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Howard F. McCue, Clerk of the Court, by Alice L. Seelye, Deputy Clerk. (Seal.)

Date: April 10, 1940.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 19th day of April, 1940, I received the within summons at Ft. Scott, Kansas, and executed same as follows to wit: By delivering at the Dewey Brillhart with an adult member of the family, namely Dewey Brillhart with an adult member of the family, named

Mrs. Minnie Brillhart (wife) a true and certified copy thereof, near Mapleton, Kansas on April 19th, 1940.

Walter C. Young died on August 2nd, 1939 at Iola Kansas. This information was obtained from a daughter a Mrs. Folk at LaHarpe, Kansas, on April 19th, 1940.

William M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy United States Marshal.

Marshal's Fees	
Travel	$5.95
Service	2.00
	$ 7.95

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

Motion to Dismiss and Answer—Filed June 27, 1940

MOTION TO DISMISS

Comes now Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and moves the court to make an order dismissing the Complaint herein for declaratory judgment on the following grounds, to-wit:

1. Because all matters and issues involved herein are involved in and fully determinable by the garnishment proceedings already pending and in progress on a judgment in the state court of Missouri at the time that the action herein for declaratory relief was commenced.

2. Because under the allegations of plaintiff's complaint a proper cause for declaratory relief is not stated or shown, and the court should exercise its judicial discretion not to entertain said suit:

(a) Because plaintiff herein is merely attempting to have the court anticipate and decide issues involved and fully determinable in proceedings already pending and in progress in the Circuit Court of Jackson County, Missouri, at Independence;

(b) Because the plaintiff herein is attempting to remove a cause from a state court into a Federal Court contrary to the provisions of the removal act;

(c) Because the plaintiff herein is merely attempting to have this court act as a court of appeals and review the proceedings had in the Circuit Court of Jackson County, Missouri, at Independence;

(d) Because the plaintiff is attempting to remove a cause from the Circuit Court of Jackson County, Missouri, to the Federal Court for the District of Kansas in violation of the removal act as such cause could only be removed to the Federal Court for the Western Division of the Western District of Missouri.

3. Because a declaratory judgment will not finally settle and dispose of the alleged controversy between plaintiff and this defendant concerning the question of the liability of the plaintiff under the policy as garnishment proceedings are pending in three other cases, identical with the one herein, in the Circuit Court of Jackson County, Missouri, [fol. 20] and adjudication by declaratory judgment herein would be merely deciding the question piecemeal.

4. Because the co-defendant herein, Walter C. Young, died before the institution of this action for a declaratory judgment, and his administrator, Carlton R. Benton, Public Administrator of Jackson County, Missouri, is a non-resident of this judicial district and beyond the reach of process of this court and a multiplicity of suits will therefore not be avoided by the rendition of a declaratory judgment herein.

5. Because all of the parties interested, namely, Carlton R. Benton, Administrator of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, are necessary parties to a complete and final determination of the plaintiff's rights in the premises and are not made parties to this suit.

6. Because plaintiff's complaint and its affidavit filed in support thereof show on their face that plaintiff is not entitled to any relief against this defendant in this or any other court.

7. Because plaintiff's action for declaratory relief grows out of and is based upon written contract or policy of con-

current insurance, co-insurance, joint insurance or reinsurance, and plaintiff has failed to set the same out, or a true copy thereof as an exhibit or otherwise, in order that the court may be fully advised in regard thereto.

8. Because plaintiff's action for declaratory relief grows out of and is founded in part upon a written contract or policy of liability insurance issued by plaintiff's reassured and reinsured by plaintiff or concurrently insured, co-insured or jointly insured by plaintiff, but plaintiff fails to set the same out, or a true copy thereof as an exhibit, or otherwise.

ANSWER

1. Comes now the defendant and alleges that plaintiff's bill of complaint herein for declaratory judgment does not state facts sufficient to entitle plaintiff to the relief prayed.

2. Further answering, defendant admits the allegations contained in Sections 1, 2, 4, 5, 6, 8, 10, 11, Sub-section (b) [fol. 21] of Section 12, first paragraph of Section 15, and the first paragraph of Section 18; alleges that he is without knowledge or information sufficient to form a belief as to the trust of the allegations contained in Sections 3, 7 and 14, and denies the allegations of paragraphs (a) and (b) of Section 12, Section 13, the second paragraph of Section 15, Sections 16, 17, the second paragraph of Section 18 and Section 19 of plaintiff's bill of complaint.

3. Further answering, defendant alleges that the plaintiff, at all the times mentioned in these proceedings, was a foreign corporation duly licensed and authorized to do business as such in the state of Missouri and in compliance with the insurance laws thereof had appointed the Superintendent of Insurance of the State of Missouri as its agent for service of process upon it in all actions in this state; that during the year 1932 plaintiff executed and delivered to the Central Mutual Insurance Company of Chicago, Illinois, a contract, treaty or policy of insurance, reinsurance, excess insurance or joint insurance, by the terms of which, among other things, it agreed to insure, reinsure, jointly insure, concurrently insure and co-insure said Central Mutual Insurance Company of Chicago, Illinois, its assureds, and all persons or corporations to whom said Central Mutual might thereafter issue policies of public liability insurance, having a cause of action arising out of opera-

tions of said assureds as public and common carriers, and to become liable simultaneously, concurrently and coextensively with the said Central Mutual upon all third party liability insurance policies which said Central Mutual might thereafter issue to other persons, firms or corporations; that, thereafter, and in January, 1934, while said contract, treaty or policy was in full force and effect the said Central Mutual Insurance Company of Chicago, Illinois; issued a contract or policy of liability insurance to said Cooper-Jarrett, Inc., a corporation, said policy being negotiated, issued, delivered and countersigned in the state of Missouri and thereby becoming a Missouri contract of insurance; that by terms of said policy so issued by Central Mutual to the said Cooper-Jarrett, Inc., said Central Mutual agreed to indemnify said Cooper-Jarrett, Inc., against all liability imposed upon it by law for personal injuries or death of any person caused by or through the ownership, maintenance or operation of any automobiles, trucks, motor vehicles or trailers owned, hired, leased or used in said busi-
[fol. 22] ness of Cooper-Jarrett, Inc., as a contract hauler; and that upon the injury or death of any person by reason thereof the liability of said Central Mutual Insurance Company of Chicago should become absolute without the necessity of satisfying any judgment which might have been obtained against said Cooper-Jarrett, Inc., and that upon the failure of said Central Mutual Insurance Company of Chicago, Illinois, to pay any such final judgment, such judgment creditor could maintain an action in any court of competent jurisdiction to compel the payment thereof, and that nothing contained in said policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, should relieve said Central Mutual Insurance Company of Chicago, Illinois, from liability thereunder, or from the payment of any such judgment; that the said Cooper-Jarrett, Inc., was a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, having its main and home office in Kansas City, Jackson County, Missouri; that it was further provided in said policy of reinsurance, excess insurance, coinsurance, concurrent insurance or joint insurance issued by plaintiff, that plaintiff should have the right and opportunity to associate itself with said Central Mutual Insurance Company of Chicago, Illinois, in the defense and control of any claim or suit covered by the said liability policy

of said Central and the right to cancel any individual policy; that said contract, treaty or policy should be subject to the statutory requirements of the respective states in which said Central Mutual's policies were issued or effective, and subject in all respects to all the general and special stipulations and clauses, waivers and modifications of the original policy, or primary policy, or other undertaking, and any endorsements or riders thereon; that under and by virtue of said contracts or policies of insurance and the endorsements required by the states of Ohio and Missouri, plaintiff and said Central Mutual Insurance Company of Chicago, Illinois, became absolutely bound and liable to defendant for damages on account of the death of said Dewey Brillhart notwithstanding any condition, provisions, stipulation or limitation contained in said contracts or policies of insurance to the contrary or the violation of the same by the assured; that the original contract, treaty, or policy of reinsurance, excess insurance, concurrent insurance, coinsurance or joint insurance, is in the hands and subject to the control of plaintiff and said Central Mutual [fol. 23] Insurance Company of Chicago, Illinois, and the original liability policy issued by said Central Mutual Insurance Company of Chicago, Illinois, to said Cooper-Jarrett, Inc., is in the hands and subject to the control of said Cooper-Jarrett, Inc., and for such reasons defendant is unable to file the same with this pleading.

4. Defendant further alleges that he is and was at all the times herein mentioned a citizen and resident of the state of Kansas; that his decedent at all of said times was a citizen and resident of the state of Missouri; that the proceedings herein are upon and relate to Missouri judgments against said Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, and that under the terms and provisions of said policy of liability insurance issued by said Central Mutual and of said reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, so executed by the plaintiff and under the laws of Missouri, and under the laws of the state of Ohio where the accident occurred upon which plaintiff's suit and judgment are based, both said Central Mutual and said plaintiff are liable not only to the defendant but also to said Cooper-Jarrett, Inc., and that under the terms of said primary insurance policy and said contract, treaty

or policy of reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, it was the duty and obligation of both plaintiff and said Central Mutual to perform their respective contracts or policies of insurance in the state of Missouri by defending defendant's action therein and by paying and satisfying in said state defendant's judgment and that under the terms of said policies and under the laws and decisions of Missouri and Ohio, defendant became and is the beneficiary under said policies of insurance; that said contract, policy or treaty of reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, matured in the state of Missouri, and became an outstanding liability of plaintiff and said Central Mutual in said state upon the filing of defendant's suit therein; upon the rendition of defendant's judgment against said Cooper-Jarrett, Inc., upon the institution of garnishment proceedings, upon said judgment against said Central Mutual in said state, and upon the institution of garnishment proceedings against plaintiff based upon defendant's judgments herein, and that by reason of all of said matters the liability of plaintiff under such contract, treaty, or policy of insurance, accrued in the [fol. 24] state of Missouri and plaintiff's obligation and liability under its said contract, treaty or policy arose out of and is based upon action or acts arising out of business transacted, acts done and contracts made in the state of Missouri or governed by the laws of the state of Missouri.

5. Defendant further alleges that it is provided by Sec. 500, Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, being a statute of the state of Illinois duly enacted by the Legislature thereof and in full force and effect at all times involved in this proceeding; that a receiver may be appointed to take charge and possession of the Illinois assets of a foreign insurance company transacting business in said state and manage, control and liquidate the same for the benefit of Illinois creditors of such foreign insurance company in the same manner and to the same extent as the receiver of an Illinois Insurance Company operating under and pursuant to Sections 496, 497 and 498 of Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, and that such Illinois receiver of the assets of such foreign insurance company transacting business in said state should have power to administer, control and liquidate reachable assets

in said state on behalf of Illinois creditors thereof even though there be at said time a domiciliary receiver of such foreign insurance company in charge thereof in the domicile of said foreign insurance company; that by Sec. 501 (Sec. 7) Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, it is provided that:

"The rights and duties of the said receiver when so appointed with reference to such non-resident or foreign company and its assets shall be those usually exercised by and imposed upon ancillary receivers of non-residents or foreign corporations in this State."

That by Sec. 502a and 503b, of Chapter 73, Smith-Hurd, Revised Statutes of Illinois, duly enacted by the Legislature thereof and in full force and effect at all times herein referred to, it is provided as follows:

"502a. Application for accounting, injunction, etc., Sec. 8a. No order, judgment or decree providing for an accounting or enjoining, restraining or *interferring* with the prosecution of the business of any domestic insurance corpora-[fol. 25] tion subject to the supervision of the Director of Trade and Commerce, or appointing a temporary or permanent receiver thereof, shall be made, or granted otherwise than upon the application of the Director of Trade and Commerce, represented by the Attorney General, except in an action by a judgment creditor or in proceedings supplementary to execution after notice thereof has been served upon the Director of Trade and Commerce of final judgment at least 30 days prior to the filing of such bill.

"503b. Practice, Sec. 11. The mode of summoning parties into court, rules of practice, course of procedure, and powers of the court in all cases arising under this Act, shall be the same as in ordinary proceedings in equity in this State and as by law provided."

That the Supreme Court of Illinois, being the court of last resort in said State, in the case of People v. Heihaus, 336 Ill. 104, 190 N. E. 349, held that the aforesaid insurance statutes of the State of Illinois respecting the appointment of a receiver for an insurance company, makes such receiver an executive or administrative officer and not a judicial officer.

That the Illinois Court of Appeals in the case of Miller v. Central Mutual Insurance Company of Chicago, 299 Ill.

App. 194, 19 N. E. (2d) 822, held that the Illinois statutes relating to receivership of insurance companies only conferred general equity powers upon the court in such receivership cases and that such receiver was and became an administrative rather than a judicial officer.

6. Defendant further alleges that in the receivership proceedings of Central Mutual Insurance Company of Chicago, Illinois, referred to in plaintiff's bill, the Illinois Court having jurisdiction thereof and supervisory control thereover, recognized the power and jurisdiction of courts in other jurisdictions to proceed to final judgment in cases pending therein against Central Mutual Insurance Company of Chicago, Illinois, and made an order in said cause authorizing receiver to defend only the cases pending against said insurance company in other courts where said insurance company had put up collateral security and that said court in said order further authorized said receiver to abandon the defense of several hundred other cases pending in various [fol. 26] courts, allowing the same to proceed to judgment without any defense thereof by such receiver, Miller v. Central Mutual Insurance Co. of Chicago, 299 Ill. App. 194, 19 N. E. (2d) 822.

Defendant further alleges that it was held by the Supreme Court of Illinois, being the court of last resort in said State, in the case of Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, that the receiver's power extends no further than that of the court appointing him and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court, and that in contempt proceedings against a creditor who seeks by attachment or garnishment to reach debts due to an insolvent debtor for non-residents, it is proper for the court to inquire which of the parties has a permanent right or superior equity in the debts; that it was held by the Supreme Court of Illinois in Mulcahey v. Strauss, 151 Ill. 70, 30 N. E. 402, that where a suit is brought against an insolvent in receivership without leave of court in the receivership proceedings that the remedy is by injunction or contempt proceedings, but that the judgment rendered in said cause is not void; that is, that it was held by the Supreme Court of Illinois in the case of Holbrook v. Ford, supra, and by the Illinois Court of Appeals in the case of Corn Exchange Bank v. Rockwell, 58 Ill. App. 506, that a contro-

versy between a foreign receiver and an Illinois attaching creditor of the insolvent that the court would protect the Illinois creditor whether the attachment was prior or subsequent to the appointment of the foreign receiver; that it was held by the Illinois Court of Appeals in the cases of Boyles v. Royal Canner Mfg. Co., 216 Ill. App. 576; Ill. etc. Bank v. Northern Bank, 214 Ill. App. 440, and Smith v. Berz, 125 Ill. App. 122, that Illinois creditors attaching property in Illinois acquire rights thereto superior to those of a foreign receiver of such debtor who has not reduced the property to possession before attachment, and by the last mentioned case it was further held that an order of the foreign court enjoining prosecution of attachment proceedings has no extra territorial effect as to persons not parties to the foreign proceedings.

7. Defendant further alleges that the Central Mutual Insurance Company of Chicago, Illinois, was at all times herein mentioned an insurance corporation organized under the laws of a state other than Missouri and duly authorized and licensed to transact an insurance business in the State [fol. 27] of Missouri, having appointed the Superintendent of Insurance of said state as its agent, upon whom service of process might be made in said state in all actions against said insurance company; that prior to proceeding to a trial and judgment herein against said Cooper-Jarrett, Inc., defendant obtained leave of and from the bankruptcy court wherein reorganization proceedings in bankruptcy of said Cooper-Jarrett, Inc., where pending, being the United States District Court for the Western Division of the Western District of Missouri, said bankruptcy court making an order granting this defendant leave to prosecute his cause in the Circuit Court of Jackson County at Independence to judgment; that the plaintiff was given full and timely notice of the proceedings herein prior to the rendition of said judgment against said Cooper-Jarrett, Inc., and was afforded a full and ample opportunity to investigate, appear and defend the same on behalf of said Cooper-Jarrett, Inc., and on behalf of said Central Mutual Insurance Company of Chicago, Illinois, and on its own behalf, but that plaintiff failed, refused and omitted to take advantage of said opportunity and to investigate, appear and defend said action; that the premises considered and in view of the fact that Cooper-Jarrett, Inc., and said Central Mutual Insurance Company

of Chicago, Illinois, were duly served in said cause the judgment herein against said Cooper-Jarrett, Inc., and and against said Central Mutual Insurance Company, Chicago, Illinois, are final, valid and subsisting judgments, by which both they and the plaintiff herein are bound, and that the same are and have become res adjudicata and final, so far as this proceeding is concerned.

8. Defendant further alleges that the claimed defenses based upon the Illinois receivership of Central Mutual Insurance Company of Chicago, Illinois, and the injunction therein, constitute affirmative defenses (if the same constitutes any defense, which defendant denies) which the said Central Mutual Insurance Company of Chicago, Illinois, and which the plaintiff herein having notice of said proceedings failed and omitted to plead or set up in opposition to the garnishment proceedings instituted by the defendant against said Central Mutual Insurance Company of Illinois, based upon the judgment herein against Cooper-Jarrett, Inc., and that said insurance companies, having failed to avail themselves of the supposed constitutional provisions claimed by plaintiff to have been violated, forever waived, [fol. 28] abandoned and lost such supposed defenses.

9. Defendant further alleges that all the issues of and concerning plaintiff's liability to defendant on account of said judgment, referred to in plaintiff's bill of complaint, and on account of said contracts or policies of insurance referred to, can be decided in the garnishment proceedings referred to in said bill, said judgment having been rendered by the Circuit Court of Jackson County, Missouri, at Independence, in a cause of action therein entitled Dewey Brillhart, Administrator of the estate of James Dwight Brillhart, deceased, v. Cooper-Jarrett, Inc., No. 83,918; that an execution has been issued upon said judgment and plaintiff herein summoned to answer as garnishee, and that said garnishment proceedings are now pending and undisposed of in the Circuit Court of Jackson County, Missouri, at Independence, and were pending long prior to the institution of the proceedings herein.

Defendant further alleges that there are now pending in the Circuit Court of Jackson County, Missouri, garnishment proceedings upon four judgments rendered against said Cooper-Jarrett, Inc., and said Central Mutual, includ-

ing that of defendant herein, under identical circumstances, the style of the cases, dates of filing and the date and amount of the judgments being as follows, to-wit:

Stye of Case.	Amount of Recovery Sought.	Date of Filing.	Date and Amount of Judgment.	
William T. Alford, Administrator (later Carlton R. Benton, Administrator) of the Estate of Ralph Russell Phillips, deceased, v. Cooper-Jarrett, Inc.	$50,000	12-14-35	11-10-38	$15,000
Rex Phillips v. Cooper-Jarrett, Inc.	10,000	7-8-36	11-10-38	10,000
Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, v. Cooper-Jarrett, Inc.	25,000	12-4-35	4-22-39	20,000
Walter C. Young v. Cooper-Jarrett, Inc.	10,000	4-23-36	4-22-39	10,000

Defendant further alleges that on January 13, 1940, plaintiff herein filed a bill of complaint for declaratory judgment and other relief in the District Court of the United States for the Western Division of the Western District of Mis-[fol. 29] souri, styled The Excess Insurance Company of America, a corporation, Plaintiff, v. Cooper-Jarrett, Inc., a corporation, Carlton R. Benton, Administrator d. b. n. of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, Defendants, No. 447, said bill being identical in its allegations with that filed herein, and, that thereafter and on March 22, 1940, after having obtained service upon defendants, Cooper-Jarrett, Inc., Carlton R. Benton and Rex Phillips, plaintiff voluntarily dismissed said suit for a declaratory judgment and filed its reply to plaintiffs' denial of garnishee's answer in the Benton and Phillips garnishment in the state court, setting up in defense thereof the identical grounds set forth in plaintiff's bill herein for a declaratory judgment and other relief.

10. Defendant further alleges that all the parties interested have not been made parties to this suit either as plaintiff or defendants and will not be bound by a judgment rendered herein; that any decision rendered by this court will not finally establish the liability or non-liability of this

plaintiff; that the filing of the bill herein will not clarify or settle the legal relations in issue; that it will not terminate and afford relief from the alleged uncertainty, insecurity and controversy giving rise to the proceeding, and that a proceeding involving the identical issues between the parties hereto is already pending in another tribunal and that the remedy therein will be more effective or appropriate under the circumstances; that if the plaintiff has a good defense the same may be asserted in the said pending garnishment proceeding.

Wherefore, defendant prays that the court refuse to take and assume jurisdiction of this suit, or the subject matter thereof, or the alleged controversies herein presented; that it will hear and determine defendant's motion to dismiss before proceeding to hear the cause upon the merits and dismiss the same; and, in the event of the failure of the court to dismiss said cause upon the pleadings that by reason of the matters and facts stated in defendant's answer, the court by its order and decree discharge defendant and permit him to go hence without day and recover his costs herein and [fol. 30] dismiss this action, and for such other and further relief as to the court may seem just and equitable in the premises.

Ratner, McAllister & Mattox, by (Signed) Stuart T. McAllister, Parsons, Kansas; Clarence C. Chilcott (Signed), 918 Scarritt Bldg., Kansas City, Mo., Attorneys for Defendant, Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased.

Received copy hereof this 22 day of June, 1940.

Ryland, Stinson, Mag & Thomson, by Paul R. Stinson, 201 First National Bank Bldg., Kansas City, Mo.; Louis R. Gates, D. H. Woods, 406 Commercial National Bank Bldg., Kansas City, Kansas, Attorneys for Plaintiff, Excess Insurance Company of America.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS OF JULY 1, 1940

Hearing had before the Honorable Richard J. Hopkins, judge of the above entitled court, without a jury, at Kansas City, Kansas, Monday, July 1, 1940.

The plaintiff in this action was represented by Messrs. Ryland, Stinson, Mag & Thomson, of Kansas City, Missouri, by Mr. Paul R. Stinson and Mr. R. H. Woods, and by Mr. Louis R. Gates of Kansas City, Kansas.

The defendant was represented by Mr. Stuart McAllister of Parsons, Kansas, and Mr. C. C. Chilcott of Kansas City, Missouri.

The Court: There is a motion to dismiss here and I wish you would tell me first of all about the starting of the litigation in Missouri.

[fol. 31] Mr. McAllister: Mr. Chilcott filed the suit.

The Court: All right.

Mr. Chilcott: Your Honor, Mr. Brillhart lived in Kansas and his son was the person who was killed in this accident. He employed Mr. Ratner and Mr. Ratner got us to help him and we filed suit in the Independence Division. That suit was filed sometime in 1935. Of course, they are given a number and of course they come up in rotation as listed. That suit pended along for a long time and finally Cooper-Jarrett went into the hands of a Receiver.

The Court: That was an action against the insurance company?

Mr. Chilcott: No, that was an action against Cooper-Jarrett, the defendant, the one who caused the death. That was an action against them. Now, thereafter Cooper-Jarrett attempted reorganization under Section 77B, the Federal act. In the course of that bankruptcy proceeding, Judge Reeves issued an order permitting us and three other plaintiffs who had suits pending in the courts of Jackson County, growing out of a similar transaction in the State of Ohio to proceed against Cooper-Jarrett. I can't tell you, your Honor, which one went into bankruptcy first, or insolvency first, whether Cooper-Jarrett or the Central Mutual, but the Central Mutual on January 30, 1934, issued its public liability policy and placed thereon endorsements pursuant to the orders of the Public Service Commission of Missouri and a similar body acting for the State of Ohio. In 1932, and previous to the issuance of this policy, this public liability policy, the Central Mutual Insurance Company of Chicago had taken out a policy of insurance, excess insurance, with the Excess Insurance Company of New York which provides that all policies issued by Central Mutual subsequently to that policy, that they would have the insurance over and above five and ten thousand dollars. Now, along while this suit

was pending against Cooper-Jarrett, and while all four of these suits, as a matter of fact, were pending against them——

The Court: (Interrupting) Was Cooper-Jarrett incorporated?

Mr. Chilcott: Yes, sir, Mr. Cooper operated a truck line from Kansas City, Missouri, through New York through specified routes.

[fol. 32] The Court: Yes.

Mr. Chilcott: While that suit was pending, Mr. Frank Barker had been appointed by Judge Reeves, either appointed by Judge Reeves or it was agreed that he act as attorney for Cooper-Jarrett and they were attempting to get the assets of Cooper-Jarrett together. He wrote a letter to the Excess Insurance Company of New York, advising them of these suits which were pending, the policy of the Excess having provided they could participate in any defense of any of the claims which arose under the primary policy issued by Central Mutual, and Excess Insurance Company refused to defend these lawsuits. That was, I think, in January or February, 1939. Afterwards on, I think, it was April 20, 1939, we took a default judgment against Cooper-Jarrett. We put on our evidence. We have a procedure in Missouri that provides you take an interlocutory judgment and you proceed on to final judgment. That was in the state court at Independence. The same thing was done in the Young case which comes out of the same accident, and in the Phillips actions which grew out of this accident. Pursuant to that, garnishment proceedings were instituted and the Central Mutual Insurance Company of Chicago summoned as garnishee. That was to the September, 1939, term of court at Independence, and in due time interrogatories were filed. No answers were made to those interrogatories and thereafter along in January, 1940, sometime, a default judgment was taken against the Central Mutual Insurance Company of Chicago. A judgment was not taken against that company at that time in favor of Brillhart because the sheriff or I mean the Clerk of the Court at Independence had lost the execution. We couldn't find the execution of garnishment on the sheriff of Cole County. These summonses being necessary to summon the garnishee by service on the Superintendent of Insurance, and they were not discovered until just recently, and just recently we have taken a default judgment against Central Mutual

Insurance Company of Chicago for the amount of our judgment, our judgment against Cooper-Jarrett. Now the proceedings are pending now in the Phillips cases. The garnishment proceedings are pending upon the answer of the garnishee, which is the Excess Insurance Company of New York, plaintiff in this case. In the Young case, Mr. Young has died and the judgment over there has recently been revived in the name of the Public Administrator of Jackson [fol. 33] County. In the Brillhart suit garnishment has been issued and served upon the Superintendent of Insurance as against Excess Insurance Company of New Jersey. I think they have subsequently changed to New York. That is the way the situation was. I don't recall just when this suit was filed, April 4th, 1940.

Mr. McAllister: Answer of the garnishee is due in September on this garnishment.

Mr. Chilcott: Yes, in this particular case as well as in the Young cases.

Mr. Woods: If I might bring out one point in that connection. He was mistaken. This was April 10th when this declaratory judgment suit was filed at Fort Scott. At that time no judgment had been attained in the Brillhart case and no judgment and garnishment had been issued against the Excess of America. It was — until after this case was filed, and until May 29th this year that summons and garnishment was issued against the Excess in this case. It was just last week that judgment was taken against Central Mutual of Chicago by default in the Independence Division.

Mr. Chilcott: I think it was in January, 1940, that the plaintiff in this case, the Excess Insurance Company, brought a declaratory judgment suit in the District Court of the United States for the Western Division of the Western District of Missouri against all four of these judgment creditors.

The Court: Who brought that suit?

Mr. Chilcott: The same plaintiff that brought this suit. I was not present at their argument before Judge Reeves when he refused to issue the temporary injunction. I don't know whether they had any argument or not. You didn't have any argument on the merits, did you, in that suit before Judge Reeves?

Mr. Stinson: We had an argument on the temporary injunction.

Mr. Chilcott: And Judge Reeves refused to issue the temporary injunction, and afterwards this plaintiff here dismissed that declaratory judgment suit over in the District Court for the Western District of Missouri.

[fol. 34] Mr. Stinson: Your client was made a defendant in that suit, was invited to come in and declined to do it.

Mr. Chilcott: Yes, we were made defendant as well as Young made a defendant.

The Court: I am wondering why Kansas, the District Court of Kansas should be considering this matter. What good reason is there why the Federal Court of Kansas should take over this litigation from the State of Missouri?

Mr. Woods: I would like to go through the facts as they occurred here and try to show your Honor why the District Court of Kansas should retain jurisdiction of this case.

The Court: All right.

Mr. Woods: This is a suit for a declaratory judgment brought by the Excess Insurance Company of America, the plaintiff here, to have judicially interpreted——

The Court: (Interrupting) Why didn't you go ahead with your suit in Missouri? Did you dismiss that?

Mr. Woods: We couldn't get service upon these defendants in Missouri because they are residents of Kansas, and of course, it was impossible for us to get service on them over here.

The Court: Go ahead.

Mr. Woods: The purpose of this suit is to have interpreted this contract of reinsurance which was entered into between the Central Mutual Insurance Company of Chicago, Illinois, and the plaintiff, the Excess Insurance Company in New York. In addition to that, we ask the independent, equitable jurisdiction of this court to enjoin this plaintiff from enforcing against the Excess Insurance Company of America these judgments which he has obtained in the state courts of Missouri upon the ground that those judgments were obtained under circumstances which would render their enforcement inequitable and unconscionable.

The Court: Well, now, you were invited to join in that litigation and you declined to do so.

Mr. Woods: Your Honor, if I may point out to you, we were not invited to join in that litigation. If I may bring in these other matters first, I think it will make it clearer.

[fol. 35] The Court: All right.

Mr. Woods: I will bring that out later on. This contract of reinsurance was entered into between the Excess and Central in 1932. That contract was drawn and provided that Excess would reinsure the Central Company for public liability policies issued by Central in favor of various companies engaged in using automobiles or trucks, and under which the reinsurer, which is Excess, agreed to repay any amounts of ultimate net loss which the company, referring to Central, may pay in excess of, first, five thousand dollars on account of any one person injured or killed, and in excess of, first, ten thousand dollars on account of more than one person injured in the same accident, and that policy went on to define the term "ultimate net loss" which means the sum actually paid in cash, paid in settlement of loss for which the company is liable, referring to Central. Also it provided that Central should file a specimen copy with them when it issued one; that it should notify them of any action under the policy which this reinsurance covered; that it should notify them of any claim and of any suit being filed. None of that was done by Central.

Now, in 1934, as Mr. Chilcott said, Central issued this policy, this public liability insurance policy to Cooper-Jarrett, which covered, first, for five thousand dollars for one person and subsequently in March of that year was raised to ten thousand dollars for any one person in case of accident. In October of this year this accident occurred in which the defendant Brillhart's decedent was killed near Ashtabula, Ohio, and in which the defendant Young, who has not been served because he is a defendant who is dead, claims to have been injured. After that and in December of 1935, Mr. Brillhart, the defendant in this case, filed suit against Cooper-Jarrett, in the Jackson County court at Independence, and then in April of 1936, Mr. Young filed suit against them. Now, the defense was tendered Central by Cooper-Jarrett, and they refused to defend upon the ground that the policy did not cover Workmen's Compensation, and on the further ground that the premiums had not been paid by Cooper-Jarrett. Well, upon that Shughart and Johnson, who then represented Cooper-Jarrett, entered their appearance, filed pleadings in the case. Then in January of 1937, the Circuit Court of Cook County, Illinois, ordered the liquidation of the Central Mutual Insur-
[fol. 36] ance Company upon the information filed by the Superintendent of Insurance in the State of Illinois and

Henry G. Miller was then appointed receiver. That court on January 21st, issued its order restraining and enjoining all parties from prosecuting any suits against Central Mutual Insurance Company except in the receivership court and on February 1st of 1937, it ordered the receiver not to assume or undertake the defense of any suit then pending or thereafter instituted against Central except in the Receivership court. That notice was sent out by the Receiver and on February 19th, the first notice was published, which directed creditors to file their claims in the receivership court in Chicago, Illinois. That was published in the Chicago papers and the order provided it be so published and copies sent out to all policy holders and to all claimants. Then on May 14th of 1937, Cooper-Jarrett instituted its petition for reorganization under 77B in the District Court of the United States for the Western Division of the Western District of Missouri. That was before Judge Reeves and that petition approved that very same day. Mr. Frank Barker at that time represented the corporation, Cooper-Jarrett, which was to be reorganized, and following that on September 30th of 1937, that is the same year, Shughart and Johnson withdrew as counsel for Cooper-Jarrett in these damage suits, the Brillhart and Young cases. The file was turned over to Mr. Barker at that time, but after September 30th no defense at all was made for any of these cases pending in the state courts. Then sometime, I think in December of 1938 if I am not mistaken, Mr. Brillhart and Mr. Young, the defendants in this case, filed their claims in the 77B proceedings. Then on April 1st on ex parte application, they obtained——

Mr. Gates: (Interrupting) April 1, 1939.

Mr. Woods: (Continuing) Thank you. They obtained the leave of that court to prosecute these actions in the state court upon the information that there was liability insurance carried by Cooper-Jarrett. On that same day, April 1st, 1939, they withdrew the claims they had filed before in the 77B proceeding and on that same day, April 1, 1939, Cooper-Jarrett was finally discharged by the 77B court from any liability to these two defendants or to any other of these tort claimants. That was the final order winding up the 77B proceeding and approving the plan [fol. 37] presented, and it discharged Cooper-Jarrett from any liability to any of these tort claimants.

The Court: Upon what sort of hearing was that, after they had withdrawn their claims?

Mr. Woods: It was upon the final hearing.

The Court: They were not represented.

Mr. Stinson: It all happened the same day.

The Court: But they were not represented at that proceeding?

Mr. Chilcott: I was not there, and I don't think anybody representing any of the judgment creditors were there.

Mr. Stinson: Was ever any protest made to that final discharge?

Mr. Chilcott: Not that I know of.

Mr. Woods: Then, your Honor, 13 days after that, on April 13, 1939, Mr. Brillhart and Mr. Young obtained the default judgment. It was an interlocutory order in the Circuit Court of Jackson County at Independence against Cooper-Jarrett. Mr. Brillhart's judgment in that instance was for $20,000.00, and Mr. Young's for $10,000.00. Those judgments were made final on April 22, 1939, and I might add to your Honor that the transcript of the proceeding shows that there was no evidence offered as to the earning power of this boy, the Brillhart decedent, or any detailed information as to his employment by Cooper-Jarrett or anything. The only information given the court for the amount of the judgment was in his ex parte statement, "I think I ought to have a judgment for $20,000.00." The transcript shows that.

Mr. Chilcott: There was a witness introduced. Mr. Young testified.

Mr. Woods: Yes, Mr. Young testified, but it was brief and related solely to a few of the incidents surrounding the accident. Now, on June 20th, these two defendants issued summons and garnishment against the Central Mutual Insurance Company of Chicago, Illinois, by having them served upon the Chief Clerk of the Superintendent of Insurance.

[fol. 38] Mr. Gates: June 20, 1939.

Mr. Woods: (Continuing) Of the State of Missouri. That, your Honor, was two years, almost two and a half years after the institution of the receivership proceedings for Central in Chicago, after the claims had been barred, after the Circuit Court of Cook County had entered its restraining order forbidding any suits to be brought against Central Mutual except in the receiver's court. Now, service was had upon Henry G. Miller, the Receiver thereof on September 15th of 1939. The interrogatories under those sum-

monses and garnishment were filed in the Independence Division of the Circuit Court for Jackson County. Then on February 9th, Mr. Young, the defendant, obtained judgment against Central by default for $10,450.00. Central was not represented at that time at all, and in addition it is my understanding that Mr. Young was dead at that time; that he had died in August of 1939. On January 18th of 1940, the defendants in these cases issued additional summons and garnishment against Central Mutual. These were in addition to the ones they had first had issued June 20th, 1939. They sent out these others last January, and interrogatories under that second set of summons and garnishment were filed March 11th. Then on April 4th of this year the plaintiff in this suit filed this action for declaratory judgment. It was served upon the defendant Brillhart on April 19, 1940, and service could not be had upon the defendant Young because he had died last summer and there was no representative here in Kansas. In fact, after this suit was filed or perhaps it might have been shortly before, an administrator was appointed for Young who died a resident of Kansas, here in Missouri. That is, they appointed the public administrator of Jackson County, Missouri, as his representative. Then on May 29th of this year, summons and garnishment were issued by this defendant Brillhart and in the Young case also, against the plaintiff in this case. Of course, it ran because of the judgments against Cooper-Jarrett and Central in the Brillhart case; since they had obtained no judgment against Central it ran directly from Cooper-Jarrett to Excess. On June 21st, an interlocutory judgment was obtained by Brillhart against Central for $22,100.00, and that judgment was made final the 28th of June, 1940. The transcript of the proceedings in that suit shows the policy of insurance was not introduced in evi- [fol. 39] dence. The only reference made was to the judgment obtained against Cooper-Jarrett, and no other information was given to the court upon which to base that judgment.

Mr. Stinson: And it was for $22,000.00.

Mr. Woods: It was for $22,100.00, eleven hundred dollars in excess.

Mr. Stinson: No, twelve thousand dollars.

Mr. Woods: I beg your pardon, twelve thousand dollars of what the original liability of the Central Mutual Company was. There was a ten thousand dollar limit of liability

there. Now, your Honor, under these circumstances, we maintain that the plaintiff in this case has a right to have its liability first under its contract of reinsurance with Central Mutual Insurance Company judicially interpreted by this court.

The Court: Why by this court?

Mr. Woods: There was an actual controversy pending between the two defendants in this case. They were threatening to go ahead and pursue us through garnishment proceedings in order to recover upon the basis of the default judgment obtained against Cooper-Jarrett. They had not instituted suit at the time we did file this declaratory judgment action; they were threatening to do so and in fact admitted so in their answer to the petition. Now, the authorities are clear that under such circumstances, the Federal Declaratory Judgment act gives us a remedy, and particularly when in the position of the plaintiff in this case. In other words, he does not have to await the time when coercive action may be brought against him, but he may institute his action before that date in order to have his liability determined. That is exactly what the plaintiff has done in this case. They were bein, threatened with prosecution; these suits had not been actually instituted against them, but there was the active threat. Under those circumstances they chose to file this action for declaratory judgment rather than to await such time as when coercive action might be brought against them by these defendants.

The Court: Well, let's see. The Central Insurance Company, I understand, had insured this Cooper-Jarrett, and the Excess Insurance Company had reinsured the Central? [fol. 40] Mr. Woods: That is correct, your Honor.

The Court: Now, this whole controversy grows out of an injury or death occurring when?

Mr. Woods: In 1934, October of 1934.

The Court: October, 1934.

Mr. Stinson: In Ohio.

The Court: And Cooper-Jarrett was insured by both the Central and the Excess. Now, why was the suit filed in Missouri against Cooper-Jarrett?

Mr. Chilcott: They are a Missouri corporation, your Honor. They have their main office in Kansas City, Missouri.

The Court: I see. Well, anyway, almost six years ago—what was it, a death?

Mr. Chilcott: A death, your Honor.

Mr. Woods: Defendant Brillhart's decedent was killed, your Honor.

The Court: Yes, and during almost six years now the representatives of the decedent, by one technicality or another have been prevented from recovering for that death. It will be six years next October. Now, having had all these various lawsuits and you having filed one yourself in the Federal District Court of Missouri, you abandon that suit and come over into Kansas and file one. I don't think this court ought to interfere with it.

Mr. Woods: Your Honor, if I might go a little further. It is true that this suit was filed in December of 1935, but this plaintiff, the Excess Insurance Company of America, had no notice of the occurrence of these accidents or the filing of this suit at any time until this letter written by Mr. Barker.

The Court: When was that?

Mr. Woods: In February of 1939, and in that they did not——

The Court: They never heard of these deaths?

Mr. Gates: That is right.

Mr. Woods: Until February, 1939, and in that letter Mr. Barker merely said that or listed these four cases, the [fol. 41] Brillhart and the Young, the Phillips and the Benton cases and said some have gone to judgment.

Mr. Chilcott: This one had not gone to judgment then.

Mr. Woods: The information was not given at all.

The Court: What inquiry did they make when they got that letter.

Mr. Woods: Mr. Barker asked them, he said he heard they had reinsurance of Central Mutual policies. He asked them what their policy was and asked them what they wanted to do. He said, "If your company desires to take over or assist in any or all of the above matters, please let me hear from you at your early convenience." Now, they replied to that letter on February 20th, telling him that the proper party for him to communicate with was the Central Mutual Insurance Company of Chicago, Illinois, and its receiver, and after that they had no further communication about any of these actions that were pending. Before that they did not know of the issuance of this policy to Cooper-

Jarrett. They did not know of the occurrence of the accident or the prosecution of these claims at all. The first they knew was in February, 1939, at a time when Central had already been discharged from liability, or its Receiver, and just a little more than a month *before Cooper Jarrett* was discharged from liability in the 77B proceeding.

The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried?

Mr. Woods: That is correct, and it is almost six years now.

The Court: Well, I don't think this court will interfere with that. This case will be dismissed.

You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this court feels in its discretion that it ought not to interfere with that litigation in any way.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Filed July 29, 1940

Now on this first day of July, 1940, pursuant to assignment, this cause coming on to be heard upon the plaintiff's bill of complaint for declaratory judgment and other relief, and upon defendant's motion to dismiss the same, the plaintiff appearing by its attorneys of record, Paul R. Stinson, Louis R. Gates and Dick H. Woods, and the defendant appearing in person and by his attorneys of record, Stuart T. McAlister and Clarence Chilcott, and the Court having duly considered said bill of complaint and said motion to dismiss, having heard and considered the statements of fact and arguments of counsel, and the length of time which has transpired since the inception of the Missouri suit referred to in plaintiff's complaint, and being fully advised in the premises, finds that in the exercise of the Court's sound discretion defendant's motion to dismiss plaintiff's bill should be sustained, and the case be not heard upon the merits by this Court.

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff's bill of complaint be and it is hereby dismissed at the costs of plaintiff, to which ruling, order and judgment, the plaintiff excepts.

It Is Further Ordered, Adjudged and Decreed, pursuant to Rule 41 (b) of the existing Federal Rules of Procedure, that this order of dismissal is not an adjudication upon the merits of the bill of complaint or of the plaintiff's cause of action.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 28, 1940

Notice is hereby given that The Excess Insurance Company of America, plaintiff in the above-entitled action, hereby appeals to the Circuit Court of Appeals for the [fol. 43] Tenth Circuit from the decree and final judgment of dismissal entered in this action on July 1, 1940.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas; Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri; Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri, Attorneys for Appellant, The Excess Insurance Company of America.

Ryland, Stinson, Mag & Thomson, Kansas City, Missouri, of Counsel.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTES RE APPEAL BOND, DESIGNATION OF RECORD AND STATEMENT OF POINTS

[Appeal bond in the sum of $250, with appellant as principal and United States Guaranty Company as surety, was filed August 28, 1940.]

[The designation of record filed in the trial court is identical with the designation printed at page 2.]

[The statement of points relied on, filed in the trial court, is identical with the statement printed at page 1.]

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME TO FILE AND DOCKET APPEAL—Filed October 5, 1940

Now, on this 5 day of October, 1940, for good cause shown, it is ordered that time for filing and docketing appeal in the above-entitled case be and is hereby enlarged fifteen days, and said appeal shall be filed on or before October 22, 1940.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION

Third Day, April Term, Wednesday, April 16th, A. D. 1941. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, Dick H. Woods, Esquire, appearing for appellant, Clarence C. Chilcott, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—June 23, 1941

Dick H. Woods (Louis R. Gates, Paul R. Stinson, and Ryland, Stinson, Mag & Thompson were with them on the brief) for Appellant.

Clarence C. Chilcott (Stuart T. McAlister, Ratner, McAlister & Mattox were with him on the brief) for Appellee.

Before Phillips, Bratton and Huxman, Circuit Judges

Huxman, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the District of Kansas dismissing ap- [fol. 45] pellant's petition for a declaratory judgment. (28 U. S. C. A. § 400.) The sole question presented for consideration is the right of the Excess Insurance Company of America, appellant herein, to maintain an action for a declaratory judgment seeking to determine its liability to appellees under a reinsurance agreement contract executed by it with The Central Mutual Insurance Company of Chicago, Illinois, herein referred to as Central.

Appellant and Central were both engaged in writing indemnity insurance. In 1932 appellant entered into a reinsurance contract with Central whereby it agreed to reinsure the risks assumed by Central under contracts it would write, subject to the conditions and provisions in the contract. In 1934 Central issued a public liability insurance policy to Cooper-Jarrett, Inc., insuring it against loss for liability imposed on it by law resulting from the operation of its trucks in its transport business. In October, 1934, a Cooper-Jarrett truck was involved in an accident resulting in death to appellee Brillhart's decedent and injury to appellee Walter C. Young. Immediately after the accident, appellees filed separate actions against Cooper-Jarrett to recover damages in the Circuit Court of Jackson County, Missouri. Central was tendered the defense of the suits, but declined on the ground that the accident was not within the coverage of the policy. Cooper-Jarrett thereupon employed attorneys, who filed answers traversing the allegations of the respective petitions.

In 1937 Central became insolvent and was liquidated in the Circuit Court of Cook County, Illinois. An order was entered restraining all claimants from prosecuting actions against it. No claims were filed by appellees with the receiver of Central and any liability against it on the policy has been extinguished.

Subsequent to the receivership of Central, Cooper-Jarrett undertook reorganization proceedings under Section 77 B of the National Bankruptcy Act. Appellees both filed

their claims in this proceeding. Thereafter, on April 1, 1939, the bankruptcy court entered an order permitting them to withdraw their claims and prosecute their action in the District Court on the ground that Cooper-Jarrett had [fol. 46] insurance. The attorneys who had filed answers for Cooper-Jarrett in the damage actions withdrew September 30, 1937. No other attorneys were employed thereafter by Cooper-Jarrett to represent it in the pending actions. On April 22, 1939, default judgments were entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of appellee. After the default judgments, garnishment proceedings were instituted against Central, in violation of the order of the Circuit Court of Cook County, by summons delivered to the Superintendent of Insurance of Missouri. Judgment was entered in favor of appellee Young in these proceedings on February 9, 1940, and also apparently in favor of appellee Brillhart on June 28, 1940.

At no time was appellant ever notified by Central of the accident or of the suits filed in the Cook County Court. The first notice of any kind it ever received was in a letter from Frank P. Barker, attorney for Cooper-Jarrett in the reorganization proceedings, on February 9, 1939. In this letter Barker stated that he had learned that appellant had reinsured Central's risk and asked confirmation thereof. He listed the cases pending against Cooper-Jarrett, including those of appellees. Appellant replied that it had no knowledge of these cases and referred him to the receiver for Central.

Appellant filed its bill of complaint against appellees April 10, 1940, in the District Court of the United States for the District of Kansas, seeking a declaratory judgment determining its liability to them under the reinsurance contract between it and Central. It is not necessary to set out the allegations of the bill of complaint. It contained the usual allegations found in such an action. The bill clearly stated a justiciable controversy. Nor is it claimed by appellees that there was a failure to state a justiciable controversy. The assertion rather is that an action was pending in another forum in which the rights of the parties might have been settled and that therefore the trial court acted within its discretionary powers in dismissing the declaratory judgment action and requiring the parties to litigate their rights in the other pending action.

Ordinarily a court having jurisdiction of the subject mat-

[fol. 47] ter and over the parties to a justiciable controversy must exercise that jurisdiction. This is, however, not an absolute mandate and the court has some discretionary power as to whether it will in each instance assume and exercise the jurisdiction which the statute confers. Kansas City So. Ry. Co. v. United States, 282 U. S. 760, 763, 51 S. Ct. 304, 306, 75 L. Ed. 684; Canada Malting Co. Ltd., v. Paterson Steamships, Ltd., 285 U. S. 413, 76 S. Ct. 413, 76 L. Ed. 837; American Automobile Ins. Co. v. Freundt, et al., 7 Cir., 103 F. 2d 613; United States Fidelity & Guaranty Co. v. Koch, 3 Cir., 102 F. 2d 288.

Where a prior action has been filed in a court of concurrent jurisdiction between the same parties and involving the same issues, and a decision by that court would adjudicate all the rights of the parties, a federal court, although having jurisdiction to entertain an action brought by a defendant in the pending cause, may within its discretionary powers refuse to entertain jurisdiction. Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. 2d 321; Maryland Casualty Co. v. Consumers Finance Service, Inc., 3 Cir., 101 F. 2d 514; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 99 F. 2d 665.

But a federal court may not refuse to assume jurisdiction merely on the ground that another remedy is available or because another suit is pending, if the controversy between the parties will not necessarily be determined therein. Maryland Casualty Co. v. Consumers Finance Service, Inc., supra.

At the time appellant filed its action for a declaratory judgment, no action was pending in any court in which it was a party. No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. The only proceeding pending in any court was the garnishment action instituted by appellees in the District Court of Jackson County, Missouri, against Central; appellant was not a party to that cause. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not deter-
[fol. 48] mine the liability of appellant under its reinsurance contract.

The intent of Congress in passing the declaratory judgment act was to afford one who is threatened with liability an early opportunity to determine his rights by forcing his adversary to come into court and assert his claim, without waiting until it pleased him to institute an action to recover, and thus minimize the danger of loss. E. Edelmann & Co. v. Triple-A Specialty Co., 7 Cir., 88 F. 2d 852; Milwaukee Gas Specialty Co. v. Mercoid Corp., 7 Cir., 104 F. 2d 589.

The situation in which appellant found itself was squarely within the purview of the act. It was faced with a possible claim of liability on its policy of reinsurance. In fact, appellees now claim that appellant is liable to them. No claims had been asserted against it; no suit had been filed in any court seeking to hold it liable; but the contingent liability was there. It was not compelled to await the time and pleasure of appellees in instituting their action. It had a clear right to go into a federal court of competent jurisdiction, which had jurisdiction over appellees, and ask that they be compelled to come in and assert their claims.

The trial court exceeded its discretionary powers in dismissing appellant's bill of complaint. The cause is therefor reversed and remanded with directions to reinstate the bill of complaint and proceed with the determination of the issues.

Reversed and remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 23, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

[fol. 49] On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that the cause be and the same is hereby remanded to the said district court with directions to reinstate the bill of complaint and proceed with the determina-

tion of the issues; and that The Excess Insurance Company of America, a corporation, appellant, have and recover of and from Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, appellees, its costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTE RE FILING OF PETITION FOR REHEARING

[In conformity with the written direction of counsel, the petition for rehearing filed July 23, 1941, is omitted from the record to accompany a petition for writ of certiorari.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—August 28, 1941

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION BY APPELLEE, DEWEY BRILLHART TO STAY MANDATE—Filed September 5, 1941

Comes now the above named Appellee herein and respectfully moves the court for the stay of a mandate in said cause and in support thereof says:

(1) That on the twenty-third day of June, 1941, an order and judgment was made and entered by this court reversing the judgment of the District Court of the United States for [fol. 50] the District of Kansas, Third Division, in favor of Appellee, whereby the petition of the above named Appellant herein was dismissed; that thereafter Appellee filed a petition for rehearing in due time and on the twenty-third

day of July, 1941, together with his suggestions in support thereof, and that on the twenty-eighth day of August, 1941, said petition for rehearing was denied.

(2) That this Appellee intends to, and will, file a petition in the Supreme Court of the United States within the time provided by law for the issuance of a writ to require by certiorari that said cause be certified to the Supreme Court of the United States for determination by it as provided in Sec. 240 of the Judicial Code of the United States, being Sec. 347, Code of Laws of the United States, 1934 Ed., and amendments thereto, and of Title 28, U. S. C. A.

Wherefore, this Appellee prays that an order for a stay of the mandate and of the execution and enforcement of the judgment of this court and all proceedings now pending herein in this cause be entered by this court, and if any certification of the judgment of this court to said District Court of the United States for the District of Kansas, Third Division, or the issuance of such mandate has been made, that the same be recalled and that said stay of the mandate be effective for the period of time within which Appellee is permitted to petition the Supreme Court of the United States for the issuance of its writ of certiorari and that if a writ of certiorari be granted by the Supreme Court of the United States in this cause that said mandate be further stayed until said cause has been disposed of by the Supreme Court of the United States.

Clarence C. Chilcott, 918 Scarritt Bldg., Kansas City, Mo.; Stuart T. McAlister, Ratner, McAlister & Mattox, Parsons, Kansas, Attorneys for Appellee.

Receipt is hereby acknowledged of service upon Appellant of the above and foregoing motion for an order for the [fol. 51] stay or recall of this court's mandate, in the above entitled cause, this fourth day of September, 1941.

Paul R. Stinson, First National Bank Bldg., Kansas City, Mo.; Dick H. Woods, First National Bank Bldg., Kansas City, Mo.; Louis R. Gates, Commercial National Bk. Bldg., Kansas City, Kansas, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—September 5, 1941

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 5, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

Endorsed on cover: File No. 46,100. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 772. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner, vs. The Excess Insurance Company of America. Petition for a writ of certiorari and exhibit thereto. Filed November 27, 1941. Term No. 772, O. T. 1941.